FOR ARGUMENT

In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-334

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Pursuant to Rule 41(3) of the Rules of the Supreme Court, petitioner submits the following argument in reply to the contentions and argument contained in the Brief for the Respondent.

ADDITIONAL STATUTES INVOLVED:

California Evidence Code, Section 1031:

"As used in this article, 'penitent' means a person who has made a penitential communication to a clergyman."

California Evidence Code, Section 1033:

"Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege."

California Welfare and Institutions Code, Section 627.5:

"In any case where a minor is taken before a probation officer pursuant to the provisions of Section 626 and it is alleged that such minor is a person described in Section 601 or 602, the probation officer shall immediately advise the minor and his parent or guardian that anything the minor says can be used against him and shall advise them of the minor's constitutional rights, including his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel. If the minor or his parent or guardian requests counsel, the probation officer shall notify the judge of the juvenile court of such request and counsel for the minor shall be appointed pursuant to Section 634."

California Welfare and Institutions Code, Section 652:

"Whenever the probation officer has cause to believe that there was or is within the county, or residing therein, a person within the provisions

of Section 601 or 602, the probation officer shall immediately make such investigation as he deems necessary to determine whether proceedings in the juvenile court should be commenced."

California Welfare and Institutions Code, Section 653:

"Whenever any person applies to the probation officer to commence proceedings in the juvenile court, such application shall be in the form of an affidavit alleging that there was or is within the county, or residing therein, a minor within the provisions of Section 300, 601, or 602, or that a minor committed an offense described in Section 602 within the county, and setting forth facts in support thereof. The probation officer shall immediately make such investigation as he deems necessary to determine whether proceedings in the juvenile court should be commenced. If the probation officer determines that proceedings pursuant to Section 650 should be commenced to declare a person described in Section 602 to be a ward of the juvenile court, the probation officer shall cause the affidavit to be taken to the prosecuting attorney. The prosecuting attorney shall within his discretionary power institute proceedings in accordance with his role as public prosecutor pursuant to subdivision (b) of Section 650 of this code and Section 26500 of the Government Code.

"If the probation officer does not take action under Section 654 and does not file a petition in juvenile court within 21 court days after such application, or in the case of an affidavit alleging that a minor committed an offense described in

Section 602 or alleging that a minor is within Section 602, does not cause the affidavit to be taken to the prosecuting attorney within 21 court days after such application, he shall endorse upon the affidavit of applicant his decision not to proceed further and his reasons therefor and shall immediately notify the applicant of the action taken or the decision rendered by him under this section. The probation officer shall retain the affidavit and his endorsement thereon for a period of 30 days after such notice to applicant."

ARGUMENT

I.

RESPONDENT MINOR'S REQUEST FOR HIS PROBATION OFFICER WAS NOT THE EQUIVALENT UNDER *MIRANDA* OF AN ADULT'S REQUEST FOR AN ATTORNEY.

The right against compulsory self-incrimination is designed to protect only against involuntary confessions. Petitioner asserts, therefore, that when interrogating officers are faced with an ambiguous response to a *Miranda* advisement, they should be permitted to clarify the statement in order to determine whether in fact the suspect is expressing an unwillingness to speak and a desire to invoke his privilege against self-incrimination. Respondent minor in the instant case was fully advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 443. (A, pp. 54-55.) Moreover, he nowhere asserts that he was unable to understand the rights as they were explained to him. The issue before this Court is therefore whether or not respondent invoked his right to remain silent during the course of his interrogation.

Respondent claims, and the California Supreme Court ruled, that a minor's request for his probation officer constitutes per se an invocation of the right to silence under *Miranda v. Arizona, supra.* (*In re Michael C.* (1978) 21 Cal.3d 471 [146 Cal. Rptr. 358, 579 P.2d 7]; Petn. for Cert., App. A.; Br. for Resp., pp. 5-6.) At the same time, it is claimed that the ruling is not an extension of *Miranda* because the probation officer is for a juvenile the equivalent of an attorney for an adult. Moreover, respondent and the California Supreme Court assert that a request for a probation officer by a minor is distinguishable from a request for a clergyman, football coach, or other responsible person and that a consistent rule could be formulated under which only a request for the former would constitute an invocation of the right to silence. (*In re Michael C., supra* at p. 477; Br. for Resp., p. 17.) Petitioner submits that the rule adopted by the California Supreme Court below, that probation officers are the equivalent of attorneys for *Miranda* purposes, is a clearly improper extension of the rule adopted by this Court in *Miranda v. Arizona, supra,* and further that probation officers cannot be distinguished from clergymen, football coaches, or other responsible adults, in the context of the *Miranda* rules.

Petitioner submits that the analogy between probation officers and attorneys has been improperly drawn by the California Supreme Court because attorneys play a special and critical role in the criminal justice and juvenile process. While it is true that this Court's emphasis in *Miranda* on the role of an attorney during the interrogation process was based on the ability of counsel to insure due process by acting as a protective shield for his client suspect (*Miranda v. Arizona, supra* at p. 470.), there can be no question that counsel's ability to provide such protection stems from his legal training and expertise, and

his duty under the canons of ethics for attorneys to act solely on his client's behalf. This Court specifically noted in *In re Gault* (1966) 387 U.S. 1, 35-36, that neither parents nor probation officers have the necessary legal skills possessed by counsel to protect a minor during the interrogation process.

Respondent wholly discounts the legal expertise of counsel as a basis for this Court's ruling in *Miranda* and relies instead on the fact that a probation officer, like an attorney, has the ability to dispel the suspect's fears of the criminal process, to act as a trusted guardian figure for the minor, and to carry out a duty to act on the minor's behalf. (Br. for Resp. pp. 6-7.) Petitioner submits that the above roles can be fulfilled just as well and perhaps even more effectively by a clergyman, counselor, or other responsible adult to whom a particular minor might turn in time of need. In the case of a clergyman, moreover, there is in California a qualified privilege relating to communications between clergyman and penitent. (Cal. Evid. Code §§ 1031, 1033.)[1]

Yet, respondent, like the California Supreme Court, eschews any notion that a request for a clergyman, football coach or other responsible person constitutes per se the invocation of the right to silence. (*In re Michael C. supra*

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[1]California Evidence Code section 1031 provides:

"As used in this article, 'penitent' means a person who has made a penitential communiction to a clergyman."

California Evidence Code section 1033 provides:

"Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege."

at 476; Petn. for Cert., App. A., p. 24; Br. for Resp., p. 17.) Petitioner submits that the rule adopted by the California Supreme Court and the distinctions attempted to be drawn therein cannot withstand serious analysis. Petitioner submits rather that Mr. Justice Rehnquist correctly noted in his orders staying the judgment below that:

> "To treat a request for the presence of an enforcement officer [such as a probation officer] as a *per se* invocation of the right to remain silent cannot but create serious confusion as to where the line is to be drawn in other custodial settings." (*Fare v. Michael C.* (1978) ____ U.S. ____, 99 S.Ct. 3, 5 (Rehnquist, J., sitting as Circuit Justice).)

Petitioner further submits that respondent incorrectly asserts probation officers are not traditional peace officers but rather an arm of the court with a duty to act solely on behalf of their minor clients. (Br. for Resp. pp. 9-10.) Respondent stresses the fact that probation officers no longer bring petitions alleging criminal activities on the part of minors. (Br. for Resp. pp. 9-10.) While this is so (Cal. Welf. & Inst. Code § 650) it is clear that at the time of the instant confession, it was the probation officer who filed a petition which ultimately resulted in respondent's commitment to the California Youth Authority. (Former Cal. Welf. and Inst. Code § 650, Cal. Stats. 1961, ch. 1616, § 2, p. 3477.) The fact that the probation officer no longer serves such a function in California does not support respondent since the issue in this case is the role of the probation officer at the time respondent asked for him. Moreover, even under the present system the probation officer investigates offenses and forwards complaints to the prosecuting attorney who brings petitions for wardship in the juvenile court in California (Calif. Welf. & Inst.

Code §§ 652-653), and moreover, probation officers are still required under Welfare and Institutions Code section 627.5 to advise minors of their rights under *Miranda* prior to questioning them. These provisions of California law by themselves indicate that in California the probation officer is not likely to be viewed by his minor clients as a person charged exclusively with defending them against all other parties. Finally, the fact that the probation officer is an arm of the juvenile court which ultimately determines the appropriate disposition for a minor would hardly lead the minor to believe the officer would protect him against the court itself which the minor may regard as an adversary.

Respondent also relies in his argument on the fact that states differ in their use of probation officers in the juvenile justice process and do not uniformly accord probation officers peace officer status. (Br. for Resp. pp. 11-15.) This lack of uniformity among the states, along with the complicated status of probation officers in California, serves only to reinforce petitioner's position that the role of the probation officer is sufficiently unclear, at least to the layman, as to defy the formulation of a rule which can accurately predict the subjective intent of a minor who requests to see him.

The unreliability of any rule attempting to predict the subjective intent of a minor who requests to see his probation officer is further accentuated by respondent's assertion that a youth of tender years cannot be expected to understand complicated criminal procedures and therefore cannot be expected to call for an attorney when advised of his *Miranda* rights.[2] If it may be expected, as

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[2]Petitioner notes, and respondent concedes (Br. for Resp. p. 5), that this Court has never specifically applied the requirements of *Miranda* to juveniles. Here, because *Miranda* warnings were fully given to respondent, the Court is not called upon to make such a determination. Petitioner would note, however, that the interest of the juvenile court in making a disposition suitable to a minor based on the nature of his conduct as well as the circumstances in which the minor finds himself, cannot be well served by any rule which would preclude the court from consideration of any statement or confession which truly and accurately represents his account of his conduct on an issue pending before the court. Therefore, to the extent that respondent suggests the value of an inflexible exclusionary rule under *Miranda* (Br. for Petr. pp. 24-25.), it is submitted that the rule would be contrary to the interests of the juvenile justice system because such a rule would exclude accurate and voluntary confessions.

respondent suggests, that a minor will encounter difficulty in understanding his right to an attorney under *Miranda*, it surely may be expected that probation officers, whose connection with the juvenile court is apparent and who are required to advise minors of their *Miranda* rights prior to questioning them, will be viewed by minors not as advisors and confidants like attorneys, but rather as law enforcement officers like police officers or prosecutors. That in a given case the converse might also be true indicates only that a request for a probation officer is an ambiguous statement calling for clarification.

In a somewhat exaggerated statement respondent asserts that every statement is to a degree ambiguous. (Br. for Resp. p. 21.) Petitioner submits that even if this were so, no interest of a suspect, and surely no interest of the juvenile court, is diminished by permitting interrogating officers who have a doubt as to the meaning of a minor's response to a *Miranda* advisement to make further inquiries in order to determine the minor's true desires. In the present case the brief inquiry made by the interrogating officer following respondent's request to see his probation officer clearly and finally demonstrated respondent's willingness to speak. The additional questioning not only permitted respondent to answer frankly as to whether or

not he wished to speak, but it also assisted the trier of fact in making its determination as to whether or not respondent voluntarily waived his Fifth Amendment rights.

* * * * * *

II.

RESPONDENT MINOR NEVER CLEARLY EXPRESSED IN ANY MANNER HIS UNWILLINGNESS TO BE INTERROGATED.

Petitioner submits that the record of the interrogation in the instant case fully supports the conclusion of the trial court that respondent minor knowingly and intelligently waived his constitutional rights prior to confessing. Respondent argues that he in fact invoked his rights and indicated his unwillingness to be interrogated. The assertion is based on the inherently coercive nature of the custodial setting, his request for his probation officer, and his statement when readvised on his right to counsel, "How I know you guys won't pull no police officer in and tell me he's an attorney?" (Br. for Resp. pp. 15, 19-22; A, p. 55.) Respondent asserts that his statements under the circumstances of the custodial setting constituted an indication in some manner under the rules of *Miranda v. Arizona, supra* at pp. 445, 473-474, that he wished not to be interrogated.[3]

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[3]Respondent apparently relies on the following language from this Court's ruling in *Miranda v. Arizona*:

> "Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." (*Id.* at p. 445.)
>
> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (*Id.* at pp. 473-474.)

Petitioner submits not only that respondent never clearly indicated in any manner that he wished not to be interrogated without an attorney present, but also that the California Supreme Court has adopted an incorrect standard for determining the type of statement which requires cessation of further interrogation. The court below held that interrogation must cease when the suspect exhibits any conduct which "reasonably appears inconsistent with a present willingness on the part of a suspect to discuss his case freely and completely with the police *at that time.*" (*In re Michael C., supra,* 21 Cal.3d 471, 475; Petn. for Cert., App. A., p. 22.) Petitioner submits that the standard adopted by the California Supreme Court unnecessarily requires interrogating officers and reviewing courts to speculate as to the subjective intent of a person being interrogated when the actual intent of the suspect may be determined by the asking of a few simple, non-coercive questions.

In the instant case respondent's request for his probation officer was followed by a readvisement of his right to an attorney and his right not to speak to the interrogating officers. Appellant initially asked how he could be sure that the officers would not bring in a police officer and represent that he was an attorney. He was then told that he was free not to speak to the officers if he chose not to. At that point he indicated that he wished to speak to the interrogating officer. The totality of the circumstances surrounding respondent's advisement and waiver of his constitutional rights clearly indicates that his request for his probation officer was simply a request for information regarding the nature of his constitutional rights and not an

expression of a desire to remain silent. Respondent's question regarding the possibility that the police might bring in a fellow police officer and represent that he was an attorney did demonstrate some suspicion on the part of respondent as to the good faith of the police officers; however, his subsequent statements that he wished to speak to the officers indicated that his express waiver of his *Miranda* rights was all the more knowing and voluntary.

Petitioner submits it would have been regrettable had the officers interrupted their conversation with appellant when he made his ambiguous statement regarding his probation officer. The result of such a hasty interruption of the interrogation would have been the loss to the court of a valuable source of information for its ultimate disposition in the case. Respondent's expressed concern that police interrogators will use coercive tactics to obtain waivers unless they are required to cease interrogation by the inflexible rule adopted by the California Supreme Court, is answered by the facts in the instant case. Here, it is clear that the interrogating officers' further inquiries were totally noncoercive in nature and in fact revealed respondent's true desire to speak with them. Had coercive tactics been utilized, the present rule in *Miranda* would have been more than sufficient to permit the trial court to determine that the waiver was involuntary because it was coerced.

Respondent's conduct during the interrogation in the instant case belies his present claim that circumstances of the custodial setting were coercive. The entire interrogation is interspersed with numerous sarcastic comments which demonstrated that respondent was hardly cowed either by the presence of the police officers or the

circumstances in which he found himself.[4] Moreover, the fact that appellant had a probation officer to request is itself some indication that he had some prior contact with the juvenile court.

Petitioner submits based on the foregoing that respondent's waiver of his rights was voluntarily made and that the trial court correctly ruled his subsequent confession admissible as having been made in compliance with the requirements of *Miranda v. Arizona, supra.*

III.

THE RECORD DOES NOT SUPPORT RESPONDENT'S CONTENTION THAT HIS STATEMENTS WERE INVOLUNTARY FOR REASONS OTHER THAN HIS REQUEST FOR HIS PROBATION OFFICER.

Respondent contends that his statements were involun-

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[4]Included among the comments were the following:

"Q. [by the interrogating officer] Well were you out on your feet too?

A. [by respondent] Nope.
Q. You're in the truck yet?
A. Well you probably could say that.
Q. Did you ever get out of the truck?
A. I always get out of the truck.
Q. No. I mean at the time this happened.
A. Yeah, you could say that."
(A, pp. 62-63.)

"A. No. What you want me to do, tell you what he told me?
Q. Yeah.
A. I can't do that.
Q. Why?
A. Because mama said don't tell strangers nothing."
(A, p. 63.)

"Q. Who told you it was a .32?
A. Man, I know guns. I ain't dumb."
(A, p. 70.)

tary as the product of coercion apart from the question of whether he waived his rights under *Miranda v. Arizona, supra.* Respondent raised this contention at every level of state court and it was rejected by every court.

The trier of fact, after listening to the tape recording of the minor's statements and hearing the testimony of the interrogating officer, concluded that respondent had not indicated in any manner that he wished to remain silent or otherwise exercised his privileges under *Miranda.* (A, pp. 41-42.) The California Court of Appeal considered respondent's contention that he was coerced by threats and promises and rejected it, finding that the trial court's conclusions were supported by the record. (Petn. for Cert., App. B., p. 38, fn. 4.)

Although respondent asserts that the California Supreme Court failed to reach this contention that court's rejection of the contention is implicit in the opinion below. The decision of the California Supreme Court below was based solely on the request for a probation officer during custodial interrogation and was premised on an interpretation of the Fifth Amendment to the United States Constitution. (Petn. for Cert., App. A.) Had the California Supreme Court concluded that the matter could have been resolved on factual grounds, that court would never have reached the constitutional issue. It has long been the California Supreme Court's rule of construction that the court will not reach a constitutional question to dispose of the matter before it unless absolutely required to do so. Where the matter can be decided on non-constitutional grounds, the court will decide it on those grounds. (*See In re Roger S.* (1977) 19 Cal.3d 921, 944 [141 Cal. Rptr. 298, 569 P.2d 1286]; *People v. Williams* (1976) 16 Cal.3d 663, 667 [128 Cal. Rptr. 888, 547 P.2d 1000]; *Ferguson v. Keays* (1971) 4 Cal.3d 649, 656, fn. 6 [94 Cal. Rptr. 398, 484 P.2d 70]; *People v. Gilbert* (1969) 1 Cal.3d 475, 481, 484-485 [82 Cal. Rptr. 724, 462 P.2d 580]; *Palermo v. Stockton Theaters, Inc.* (1948) 32 Cal.2d 53, 65 [195 P.2d 1].)

The consistent rulings of the California courts that respondent's statements were not the product of any threats or coercion are supported by the record. All of the statements cited by respondent as invocations of the right to silence came after respondent had been advised of his constitutional rights and agreed to talk with police. (A, pp. 54-55.) In fact, even after respondent was told he could not have his probation officer present and inquired as to how he would know whether or not the police would bring in a police officer and say he was an attorney, the interrogating officers readvised respondent of his constitutional rights and stressed the fact that he did not have to talk to them at all if he did not want to. Respondent indicated that he understood his rights and agreed to talk. (A, p. 55.)

The statements which followed the admonition and waiver, viewed in the context of the interrogation, in no way indicate that respondent desired the questioning to cease. Respondent had been talking freely with the officers prior to the cited statements. However, respondent cites four such statements as indications of reluctance to talk. First, near the outset of interrogation, respondent stated, "No, I don't know anything about it." (Referring to the offense.) (A, p. 56.) This statement came after respondent agreed to talk with the police and was told that he had been brought in for questioning about a murder. Respondent indicated that he thought it was for a robbery, not a murder, and the statement in question was merely his initial assertion that he did not know anything about the murder. Respondent continued to discuss his whereabouts and activities on the date of the offense and, it is submitted,

never suggested that he wished to remain silent. (A, pp. 55-56.)

Second, respondent notes that when questioned about what another minor had said, he answered, "I can't do that." And when asked why, he said, "Because mama said don't tell strangers nothing." (A, p. 63.) This was hardly an invocation of the right to be silent. At most it was respondent's indication that he was not going to talk about any of the other minors with him at the time of the offense or what they might have done. In fact, in the context of the interrogation, the statement appears to be merely respondent's effort to inject some sarcasm into the interrogation.

Third, respondent maintains that when asked what happened on the night of the offense he stated, "Can't." (A, p. 64.) This statement came after respondent had been talking to the officers about what happened that night and was not an expression of a desire to cease answering questions. At most, the statement was a repetition of respondent's reluctance to talk about the other minors who were involved, since the statement was followed by respondent's agreement to discuss what he did on the night of the offense. (A, p. 64.)

The fourth statement cited by respondent as an indication that his confession was coerced is a statement by one of the interrogating officers that respondent had a good chance to "come out of this thing pretty good . . .", and that "the one who tells us what happened is the one that's not going to get hassled." (A, p. 65.) Petitioner submits that this statement should not be analyzed out of context, but rather must be considered together with respondent's reaction to the statement. Assuming arguendo that the only implication that may be drawn from the officer's statements is that respondent might benefit by cooperating, respondent's answer belies any inference that he was tricked or coerced into a confession. Following the statement in question, respondent stated, "Well, man, put it like this (Unintelligible) . . . take your word for that because, see I know I've been that there situation, what you just told me. They say that to just get you to cop out and then they'll back whatever you want to call it. They'll fuck you (Unintelligible) . . . just to hear you talking (Unintelligible) . . ." (A, p. 65.) Respondent's reply of disbelief amply supports the implicit finding of the trier of fact, endorsed by the Court of Appeal and the California Supreme Court, that respondent's confession was not the result of any improper trickery.

In *United States v. Washington* (1977) 431 U.S. 181, 187-188, this Court stated, "The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions." The proper test is whether, considering the totality of the circumstances, the free will of the suspect was overborn. (*Id.* at pp. 187-188; *Rogers v. Richmond* (1961) 365 U.S. 534, 544.)

It is submitted that in the course of an interrogation it is not abnormal for a suspect occasionally to pause, or otherwise to express reluctance to answer some questions. The serious nature of the questioning process would rarely produce a transcript that would read like a casual conversation. Respondent, however, would require more than an admonition and waiver of rights. Respondent would require that every hesitation or ambiguous answer from a suspect be interpreted as an invocation of the right to be silent.

Such a rule would bear little relationship to the interests sought to be protected by *Miranda* and its progeny. The prevention of coerced confessions or otherwise unreliable statements hardly requires a rule prohibiting all question-

ing where an answer is preceded by a slight hesitation. To adopt such a rule would be to forget that a counterpart to the principle against use of coerced and unreliable statements is "the interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." (*Michigan v. Tucker* (1974) 417 U.S. 433, 450.)

Based on the foregoing, petitioner submits that an independent review of the record amply supports the conclusion reached by the trial court that respondent's statements were not coerced, and that there was no invocation of his Fifth Amendment rights. While this Court may independently examine the entire record to determine whether a confession was voluntary (*See Davis v. North Carolina* (1966) 384 U.S. 737, 741-742), an appellate court is not in the same position as a trial court to determine whether a statement is voluntary. The trial court may view the witness' demeanor, assess the suspect's age and maturity, and view the totality of circumstances surrounding the interrogation. For example, respondent contends that during part of the interrogation he was crying. (Resp. Br. p. 33.) The record does not indicate the nature or intensity of the crying. Moreover, the crying could be interpreted as respondent's sorrow over being arrested or over his involvement in the offense. Clearly the trial court considered this and assessed it in light of respondent's age, experience, and maturity when concluding that the statements were voluntary. (A, p. 53.) In addition, respondent first confessed to knowledge and participation in the offense prior to this point in the interrogation. He identified the co-minor who shot the victim (A, p. 62) and later, there is a pause in the recording (A, p. 66), characterized by counsel as crying. (A, p. 47.)

Petitioner submits that the trial court's findings, which were supported by the record and which were reaffirmed by the California Court of Appeal and the California Supreme Court, were correct and that respondent's contention that his statements were involuntary even apart from the issue arising out of his request for his probation officer should likewise be rejected by this Court.

CONCLUSION

For the foregoing reasons and for the reasons heretofore stated in petitioner's papers previously filed in this Court, petitioner respectfully requests that the instant opinion and judgment of the California Supreme Court be reversed and that the judgment declaring respondent a ward of the Superior Court be affirmed.

Respectfully submitted,

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